IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION.
WRIT PETITION No. 2980 of 2003.

M/s.R. Nawroji & Co. Petitioners.

Vs.

Shri Francis E. Lobo & Anr. Respondents.

Shri S. K. Talsania with Mr. Naushad Engineer
i/b Ashok Purohit for the Petitioner.

Shri S. N. Deshpande, Advocate for
the Respondents.

CORAM: DR.D.Y.CHANDRACHUD,J.
DATED: 01.09.2006.

ORAL JUDGMENT.

1] The Petitioner is a partnership registered under the provisions of the Indian Partnership Act,1932 and inter-alia engages in the business of running a printing press. On 3rd December, 1989 the First Respondent, stating that he was 55 years of age, submitted an application for being appointed as a Machine Operator. The date of birth of the First Respondent is 21st March, 1935. On 12th December,1989 the Petitioner appointed the First Respondent for a period of six months. The First Respondent was appointed subject to the condition that if during the period of employment his work was not found

satisfactory, the management reserved its right to terminate the temporary appointment. On 7th June, 1990 the services of the First Respondent were extended, treating him to be on probation, until 31st July,1990. On 26th August, 1990 the services of the First

Respondent were terminated. The First Respondent sought a reference to adjudication under Section 10 (1) of the Industrial Disputes Act, 1947. By the time that the Labour Court delivered its Award on 14th July, 2003, the First Respondent was well over 68 years of age. The Labour Court came to the conclusion that the First Respondent had worked for a period of more than 240 days and the termination without complying with the provisions of Section 25F was illegal. Reinstatement was ordered with full back wages.

2] When this petition was admitted on 3rd February, 2004, the execution of the Award was stayed, subject to the Petitioner depositing arrears of wages upto the date on which the First Respondent would complete the age of 60 years. An amount of Rs.92,000/- has been deposited as and by way of back wages for the period until the date on which the first Respondent would attain the age of 60 years.

3] The finding of fact that the first Respondent had actually worked with the

employer for more than 240 days is not questioned before this Court. The Labour Court followed the Judgment of the Supreme Court in Workmen of American Express International Banking Corporation Vs. The Management of American Express International Banking Corporation (1985 I LL.J.539.). The expression "actually worked with the employer" under Section 25(B)(2)(b) has been held to mean the period during which the contract of employment has continued and the workman has been paid wages. The contract of employment had continued for over 240 days & the workman was paid wages for the period. Hence absent compliance with Section 25F, the retrenchment was unlawful. The Original order of appointment does not specify that the appointment was on probation. On the contrary, the appointment was made on a temporary basis. Subsequently, an effort was made by the employer to show that the earlier appointment was on probation. Such a unilateral alteration in the basis of appointment could not be valid. However, having regard to the view which would emerge in the subsequent part of this Judgment it

would not be necessary to elaborate upon this aspect of the matter any further.

4] On behalf of the petitioner, it has been submitted that the Labour Court was not justified in directing reinstatement with backwages since by the date on which reference came up the workman was well over 68 years of age. On the other hand, on behalf of the workman it has been submitted that the appropriate order now would be for the Court to direct that the workman should be reinstated with full back wages and that the workman would be entitled to continue during his entire span of life subject to medical fitness.

5] The Managing Partner of the employer stepped into the witness box and during the course of his evidence stated that the age of superannuation for employees of the firm was 58 years. There was no cross-examination in respect of this statement. The Labour Court declined to accept the plea that the age of superannuation was 58 years since the plea was not raised in the written statement. On

behalf of the employer it has been submitted that there was no occasion to raise this plea in the written statement which was filed on 13th March, 1992 since at that point of time, the workman had not attained the age of superannuation. Be that as it may, there is no dispute about the position, that as a matter of fact, neither did the contract of employment specify a particular age of retirement nor were any rules pertaining to the establishment produced before the Labour Court. In view of the fact that only six employees are engaged in the Printing Press in question, the Model Standing Orders framed under the Industrial Employment (Standing Orders) Act, 1946 were not applicable.

6] It is well settled that even if, as a general principle,the setting aside of an order of termination would result in reinstatement with full backwages that is now not regarded as an invariable principle which will not brook any exception. This was laid down in the judgment of the Supreme Court in Surendrakumar Verma Vs. Industrial Tribunal, (1980) 4 SCC 443 in which the Supreme Court

held as follows:

> "Plain common sense dictates that the removal of an order terminating the services of workmen must ordinarily lead to the reinstatement of the services of the workmen. It is as if the order has never been, and so it must ordinarily lead to back wages too. But there may be exceptional circumstances which make it impossible or wholly inequitable vis-a-vis the employer and workmen to direct reinstatement with full back wages. For instance, the industry might have closed down or might be in severe financial doldrums; the workmen concerned might have secured better or other employment elsewhere and so on. In such situations, there is a vestige of discretion left in the court to make appropriate consequential orders. The court may deny the relief of reinstatement where reinstatement is impossible because the industry has closed down. The court may deny the relief of award of full back wages where that would place an impossible burden on the employer. In such and other exceptional cases the court may mould the relief, but, ordinarily the relief to be awarded must be reinstatement with full back wages. That relief must be awarded where no special impediment in the way of awarding the relief is clearly shown."

7] In the present case, the workman is on the date of this order well over 74 years of

age. Hence, it would be wholly inapropriate for the Court to direct reinstatement in the facts of the present case, The learned Counsel appearing on behalf of the workman contended that the workman is entitled to continue in employment for his entire life span, Counsel relied on the Judgment of the Supreme Court in the case of Delhi Cloth and General Mills Ltd., Vs. Shambhu Nath Mukherjee, 1984 LAB.L.C. 1743. In that case, the Judgment of the Supreme Court indicates that the workman had expired during the pendency of the proceeding. The employer sought to submit that the monetary benefits admissible to the workman should be computed on the footing that he would have retired at the age of 60 years. On the other hand, Counsel appearing for the workman urged that since there was no valid rule of retirement on superannuation prescribing the age of 58 years, the employer was bound to reinstate the workman in service and he would have been entitled to serve till the date of death. The Supreme Court expressly kept the point that was urged by the employer open. The finding of the Labour Court was confined to the facts of that case

alone, without creating a precedent. Since the facts of that case showed that the workman had expired, the Supreme Court directed that monetary benefits be computed till the date of death of the workman. The Supreme Court directed that the employer pay monetary benefits in the amount of Rs. 1,10,000/- over and above Rs. 46,151.60 ps., which had been already paid to the workman. The Judgment of the Division Bench of this Court in the case of Mst. Dewli Bakaram and others Vs. State Industrial Court (1959) I.L.L.J. 475 that has been relied upon by the learned Counsel for the workman, again would not assist in assessing the facts of the present case. In that case the workmen of Empress Mills were retired from service on the ground that they had completed 30 years of service, in pursuance to an agreement which was entered into by the employer with the Rashtriya Mill Mazdoor Sangh providing for such a consequence. The Division Bench of this Court held, referring to the definition of the expression "retrenchment" in Section 2 (oo) of the Industrial Disputes Act, 1947 that the agreement that was entered into by the Union

was not at all an agreement for the retrenchment of workmen on reaching the age of superannuation, because the agreement did not specify an age of superannuation. On the contrary, the agreement merely provided for retirement of a workman who had worked for more than 30 years. The Judgment of a Learned Single Judge of this Court in Universal Transport Co. Mumbai Vs. Siraj Kadarbhai China and Anr. (2005) III CLR 912 is clearly distinguishable on facts. In that case, the observations in para 7 of the Judgment were to the following effect:

> "No evidence whatsoever has been brought on record by the Petitioners to indicate that the respondent should not be reinstated in service. Furthermore, when the judgment of the Trial Court was delivered i.e. 16.5.1998, the Respondent had already reached the age of 60 years. The Petitioner then ought to have taken this point in the revision application,

which they have not. Having failed to do so, such an issue cannot be raised for the first time at the stage of arguments.

Furthermore, even in the writ petition, this issue has not been raised and therefore, this Court ought not to permit the Petitioner to raise this issue regarding the age of retirement."

Therefore, no evidence was led by the employer on the material question. Moreover, even the point was not taken in the Revision application. No material was brought on the record by the employer to demonstrate as to why the workman should not be reinstated. Moreover, even though on the date of the judgment of the Trial Court the workman had already been well over the age of 60 years, this issue was not raised in the Revisional Court, but was raised, for the first time, before this Court in the arguments. In contrast, when the matter came up before the

Trial Court in the present case, the point that the first respondent was well over 58 years of age (that according to the employer being the age of superannuation) was specifically raised. The Judgments relied upon by the workman do not advance his case any further and are distinguishable.

8] Having regard to the facts and circumstances of this case, I am of the view that the ends of justice would warrant the grant of reasonable compensation in lieu of reinstatement.Prudence and law point to the same direction in this case. At seventy four a Machine Operator in a Printing Press cannot be put back in service. This case falls in the category of exceptions carved out in Surendra Kumar Verma (supra) by the Supreme Court where the ordinary rule of reinstatement must give way to compensation in lieu of reinstatement. The petitioner has in pursuance of the interim order deposited arrears of back wages, for the period between the date of termination and the date on which the workman would have attained the age of 60 years. The learned Counsel appearing on

behalf of the Petitioner has fairly stated before the Court that the entire amount which has been deposited in this Court together with accrued interest thereon may be paid over to the workman.

9] The amount deposited in this Court is permitted to be withdrawn by the workman as compensation in lieu of reinstatement and back wages. The first Respondent would be entitled to the accrued interest, if any, on the amount that has been deposited in this Court. In the aforesaid view of the matter, the directions issued by the Labour Court in its Award of 14th July, 2003 are set aside and shall be substituted by the aforesaid directions. The Petition is allowed to the aforesaid extent.

There shall be no order as to costs.

[DR.D.Y.CHANDRACHUD,J]